Supreme Court, U.S.
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(3)

No. 90-172

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

JACK ROBINETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO
BRIEF OF RESPONDENT, JACK ROBINETTE,
IN OPPOSITION

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APPENDIX A

APPENDIX A IS THE ENTIRE TRANSCRIPT OF THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE EXCEPT FOR THE TESTIMONY OF JACK ROBINETTE, WHICH HAS BEEN OMITTED BECAUSE IT IS IRRELEVANT FOR THE PURPOSES OF THIS APPENDIX.

BEFORE THE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JACK ROBINETT,

Claimant,

v. Case No. 83-BLA-4939

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS,

Respondent.

Pages 1 through 41

Place: Charleston, West Virginia

Date: July 10, 1985

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BEFORE THE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JACK ROBINETT,

Claimant,

v. Docket No. 83-BLA-4939

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS,

Respondent.

Judicial Annex Building
Kanawha County Courthouse
111 Court Street
Charleston, West Virginia

Wednesday, July 10, 1985

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE JAMES J. BUTLER,
Administrative Law Judge

APPEARANCES:

On behalf of the Claimant:

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P. O. Box 1313
Charleston, West Virginia 25325

On behalf of the Respondent:

MARK MALECKI, ESQ.
Office of the Solicitor
U. S. Department of Labor
4015 Wilson Blvd., Room 1237-A
Arlington, Virginia 22203

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Jack Robinett	9	20	--	--

EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
Director's:		
D-1 thru D-51	4	6

P R O C E E D I N G S

(9:05 a.m.)

JUDGE BUTLER: On the record.

This case comes on this morning in the matter of Jack Robinett versus Director, OWCP. It is Case No. 83-BLA-4939 which carries a corresponding OWCP number of 232-34-8295. My name is James J. Butler, assigned to hear the case this morning, and my address is as indicated on your Notice of Hearings.

For the record, may I have your formal entry of appearance please. For the Claimant.

MS. ANDERSON: My name is Sunya Anderson of the United Mine Workers of America, District 17. My address is Post Office Box 1313, Charleston, West Virginia 25325. My phone number is area code 304, 346-0341.

MR. MALECKI: Good morning, Your Honor. For the Director, I am Mark Malecki. My address is U. S. Department of Labor, 4015 Wilson Boulevard, Room 1237-A, Arlington, Virginia, zip code 22203. My telephone number is area code 703, 235-3610.

JUDGE BUTLER: Thank you very much. As the first order of business, and pursuant to the applicable regulation, I will produce and offer into the record for decision all of the exhibits previously furnished me by the Director which are numbers 1 through 51, Exhibit No. 51 being the standard Form 1025 indicating that the issues at hand this morning are item number four, the length of employment, that is whether or not the miner worked at least thirty years in or around one or more coal mines; and, lastly, item number seven,

total disability, that is whether or not the miner is totally disabled.

(The documents referred to were marked for identification as Director's Exhibits Nos. 1 thru 51, respectively.)

JUDGE BUTLER: Are there any other issues at hand this morning?

MR. MALECKI: Your Honor, in this case the Director is prepared to stipulate to thirty years of coal mine employment. So, I don't think it is necessary to raise that issue at this time. We have no additional issues.

JUDGE BUTLER: Okay. Then the only issue at hand is the question of total disability?

MR. MALECKI: Yes, Your Honor.

JUDGE BUTLER: All right.

(Pause.)

Does the Claimant have any documentary evidence they would like to produce and offer at this time?

MS. ANDERSON: No, Your Honor.

JUDGE BUTLER: Does the Director have any documentary evidence?

MR. MALECKI: Your Honor, at this time the Director has got no documents to add. We had forwarded some hospital records to the parties, however, it turned out that those were already in the record, so I won't offer them again. And, in addition, Your Honor, for the record, I would like to note that the Claimant and the Director have agreed to submit to Your Honor a report of a physical that was already undertaken on May 28th, 1985. We are, however, still awaiting the report. Apparently through some backlog in the

doctor's calendar we were unable to get that for today.

The parties have agreed -- I believe I can represent that -- that we will keep the record open for the receipt of that report and then allow both parties to review the validity of the spirometry report in Doctor Pathon's report. I expect that we could receive Doctor Pathon's report certainly within thirty days and that it would be necessary to keep the record open perhaps for another fourteen days to review the spirometry.

JUDGE BUTLER: All right. Once the medical report in question is received, unless I hear from you within fourteen days, I will assume that the record for decision will be closed thereafter.

MS. ANDERSON: Your Honor, could we lengthen that a little bit. I think two

weeks might be a little short to get a doctor to review and write us a report. Could we make that thirty days?

JUDGE BUTLER: Well, I will give you fourteen days to indicate to me that you are going to have it reviewed.

MS. ANDERSON: All right.

JUDGE BUTLER: And, then I will give you whatever time is necessary.

MS. ANDERSON: All right. Thank you, sir.

JUDGE BUTLER: But let me know within fourteen days after receipt of the report whether or not you are going to --

MS. ANDERSON: Okay.

JUDGE BUTLER: -- submit it to another physician for his opinion.

MS. ANDERSON: Yes.

JUDGE BUTLER: So, the record will be kept open for that purpose. And, if there

are no objections to the Director's exhibits, numbers 1 through 51 --

MR. MALECKI: No, Your Honor.

MS. ANDERSON: No.

JUDGE BUTLER: -- they will now be made a part of the record for decision.

(The documents referred to, having been previously marked for identification as Director's Exhibits Nos. 1 thru 51, respectively, were received in evidence.)

JUDGE BUTLER: Does the Claimant have an opening statement to make at this time?

MS. ANDERSON: Just shortly, Your Honor, in that the Director does not contest the existence of pneumoconiosis and in that the Claimant had over ten years of coal mine employment, the interim presumption at 727.203 is invoked as a

matter of law, and the only issue in this case is rebuttal. Therefore, I would like to defer my remarks until after the Director has stated in what way he believes the medical evidence supports rebuttal.

JUDGE BUTLER: All right. Does the Director have an opening statement to make at this time?

MR. MALECKI: Your Honor, I believe that -- well, I will only state that I think rebuttal is established under the evidence so far before the record by the report of Doctor Nestmann under subsection (b)(2). However, since we are expecting more medical evidence, I am not going to argue fully at this time since there may be a change --

(Pause.)

JUDGE BUTLER: All right.

MS. ANDERSON: Could I ask for a clarification on the record? I'm sorry. This isn't exactly in order.

JUDGE BUTLER: Yes.

MS. ANDERSON: I was sort of surprised this morning causation was not in issue and total disability is, only.

MR. MALECKI: Well, that it what is checked on the controversion sheet.

MS. ANDERSON: Okay.

MR. MALECKI: I could raise it but I don't think I am going to.

MS. ANDERSON: Okay.

(Pause.)

JUDGE BUTLER: Well, then we are agreed we are proceeding solely on the issue of total disability?

MR. MALECKI: Yes, Your Honor.

JUDGE BUTLER: All right. Then call your witness please.

MS. ANDERSON: Your Honor, I would like to call the Claimant, Mr. Jack Robinett.

Whereupon,

JACK ROBINETT

having been first duly sworn, was called as a witness herein and was examined and testified, as follows:

JUDGE BUTLER: Proceed.

MS. ANDERSON: Thank you, Your Honor.

(Pause.)

ROBINETT - DIRECT

DIRECT EXAMINATION

BY MS. ANDERSON:

...

(THE TESTIMONY OF JACK ROBINETTE IS OMITTED FROM THIS APPENDIX.)

...

JUDGE BUTLER: All right. You can step down if you wish, Mr. Robinett.

THE WITNESS: Yes, thank you, sir.

(The witness stood aside.)

JUDGE BUTLER: Does the Director have any evidence?

MR. MALECKI: Your Honor, we have no witnesses or further evidence at this time.

JUDGE BUTLER: All right. Does Claimant have anything by way of summation at this time?

MS. ANDERSON: I would just like to make a couple of comments with regard to Doctor's Nestmann's report about which the Director has indicated as the record now stands would support rebuttal. I have a couple of problems with that and I would like to point them out.

JUDGE BUTLER: Where does that appear in the record?

MS. ANDERSON: That is Director's Exhibit 44.

JUDGE BUTLER: 44?

MS. ANDERSON: Yes, sir.

JUDGE BUTLER: All right.

MS. ANDERSON: In that the Director does not contest causation. I assume they believe that Doctor Nestmann's report supports a conclusion of no total disability. Certainly he talks about a lot of medical problems. The only conclusion as to degree of disability he really states is that this man submits evidence of pulmonary studies that are within satisfactory limits. The chest x-ray shows minimal degree of impairment. I believe this man has pneumoconiosis. I believe that his impairment is not severe enough to interfere with returning to his

usual physical activities inside the mine if he were inclined to do so.

There are a couple of problems with this. Firstly, it is not clear whether his statement as to impairment refers only to the impairment that was diagnosed by x-ray. If that is the case, and it is not clear as I say which creates problems with the report itself, it certainly would not fulfill the requirement of Bethlehem Mines v. Massey, where the Court rejected the Benefits Review Board approach that rebuttal would be fulfilled under (b)(3) by showing that the pneumoconiosis is not alone totally disabling.

In that case they said where the combined effects of several diseases disable the miner the opposing party must establish that the miner's primary condition was not aggravated to the point

of total disability by prolonged exposure to coal dust. Certainly it wouldn't fulfill the requirement of contribution. It certainly wouldn't fulfill the requirement of aggravation.

Furthermore, it is not even certain what he is referring to when he says he could go back to his usual physical activities in that he related the employment of Mr. Robinett as being running a continuous miner. As Mr. Robinett's testimony established, running the continuous miner was not the extent of his physical requirements of his job. The other duties, the moving the cable and the duties that he would be assigned when the continuous miner was down, certainly required more exertion than running a continuous miner.

Therefore, I would suggest that Doctor Nestmann's conclusions could not fulfill rebuttal.

JUDGE BUTLER: Any response to that?

MR. MALECKI: Sure, Your Honor. I would like to respond. In this particular case I think that rebuttal is established under (b)(2). The doctor basically has found that he is able to do his usual physical activities inside the mine. And, I don't believe that one can assume that the doctor thinks that just because the doctor's category is a continuous miner operator, which in fact is his category, that the doctor believes that he has a sedentary job. And, that I think is the interpretation that my colleague here would put on Doctor Nestmann's report, and I don't think that that is a reasonable interpretation of that report.

I believe that Doctor Nestmann's report is based on a broad group of objective tests and is a well reasoned report and that it fills the requirements of Lyons versus Amax Coal. I don't think it can be implied that he would have assumed the absence of any type of exertion. I have nothing further.

JUDGE BUTLER: All right.

MS. ANDERSON: I have one more comment.

JUDGE BUTLER: Proceed.

MS. ANDERSON: Just quickly, he did not label him a continuous miner operator. He said he was running a continuous miner. But additionally I would like to note that this is not the only medical evidence in the file. There is Doctor Tan's (phonetic) conclusion that was a report that was made at the same time that lists

severe limitations on the miner's activities that may be due to pulmonary impairments.

Therefore, Doctor Nestmann's report would have to be weighed against that, in any case. But I would like to point out that it is the Director's burden to submit clear evidence, and whether it might not be that Doctor Nestmann -- maybe he was considering all the possible duties of a continuous miner operator, but I believe that would be the burden of the Director to show on the record.

JUDGE BUTLER: Does the Director have anything further?

MR. MALECKI: I have nothing further to add to my previous comments.

JUDGE BUTLER: All right. Then the record for decision will be closed with the exception heretofore noted. And, the

record should indicate the acceptance of the Claimant's prehearing report which I will retain in the file. With that, the hearing this morning is concluded. Thank you very much.

MR. MALECKI: Thank you, Your Honor.

MS. ANDERSON: Thank you.

JUDGE BUTLER: This hearing is concluded.

(Whereupon, at 9:55 a.m., the hearing in the above-entitled matter was closed.)

APPENDIX B

APPENDIX B IS THE BRIEF WHICH JACK ROBINETTE FILED IN THE FOURTH CIRCUIT AS THE PETITIONER. THE BRIEF IS REPRODUCED IN ITS ENTIRETY EXCEPT FOR SUBPART B OF PART V, ARGUMENT, WHICH HAS BEEN OMITTED BECAUSE IT IS IRRELEVANT FOR THE PURPOSE OF THIS APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 88-1144

JACK ROBINETTE,

Petitioner,

v.

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF OF PETITIONER

ON APPEAL FROM THE BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR

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I.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a). The injury at issue arose in the State of West Virginia.

II

STATEMENT OF CASE

On March 23, 1973, Jack Robinette filed an application for disability income benefits under the Federal Coal Mine Health and Safety Act of 1969 as amended. (App. 103) The application was denied and Jack Robinette requested a hearing before

an Administrative Law Judge. The Deputy Commissioner dismissed the coal mine operator and transferred potential liability to the Black Lung Disability Trust Fund. (App. 243)

A hearing was held before Administrative Law Judge, James J. Butler, on July 10, 1985 in Charleston, West Virginia. At hearing, Counsel for the Director, Office of Workers' Compensation Programs stipulated that Jack Robinette had worked 30 years in coal mine employment, had pneumoconiosis, and that pneumoconiosis was a causal factor in his disability.

The only issue contested by the Director was whether or not Jack Robinette was totally disabled as defined by the Act. (App. 37, 40, 41, 245) The record was held open for 65 days for post hearing

development of evidence. (App. 38, 76, 90)

On December 24, 1985, the Administrative Law Judge issued a Decision and Order. (App. 4) The Administrative Law Judge found that Jack Robinette had been employed in coal mining for 30 years and that he had pneumoconiosis as established by the x-ray evidence. The Administrative Law Judge stated the only issue was whether Jack Robinette was totally disabled.

Because Jack Robinette had pneumoconiosis and more than 10 years of coal mine employment, the Administrative Law Judge invoked the interim presumption pursuant to 20 C.F.R. 727.203(a)(1). The invocation gave Jack Robinette the benefit of the presumption that he was totally disabled from performing his former coal

mine employment due in whole or in part from pneumoconiosis arising out of his coal mine employment.

The Administrative Law Judge then ruled that the presumption was rebutted pursuant to 20 C.F.R. 727.203(b)(2) (hereinafter (b)(2) rebuttal) because the preponderance of the evidence established that Jack Robinette was not totally disabled from performing his former coal mine employment. The application for disability benefits was denied.

Jack Robinette filed a Notice of Appeal to the Benefits Review Board. No cross appeal was filed by the Director.

The Board reversed the Administrative Law Judge's finding that (b)(2) rebuttal was established, citing Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR (4th Cir. 1985). The Director has not challenged

the Board's reversal of the Administrative Law Judge's finding that (b)(2) rebuttal was not established.

The Board then reversed, sua sponte, the Administrative Law Judge's finding that rebuttal under Section 727.203(b)(3) (hereinafter (b)(3) rebuttal) was not established. Rebuttal under (b)(3) requires that a preponderance of the evidence establish that the miner's impairment does not arise even in part from pneumoconiosis. The Board reversed the finding that (b)(3) rebuttal was not established even though the Director had not raised the issue on appeal and even though the Director had stipulated at the hearing that (b)(3) rebuttal was not established. (App. 37, 40, 41)

Having found that Jack Robinette was not entitled to disability benefits under

the Part 727 of the regulations, the Board remanded the case for consideration of entitlement under 20 C.F.R. Section 410.490. The Board cited Broyles v. Director, OWCP, 824 F.2d 327, 10 BLR 2-194 (4th Cir., 1987), later affirmed in Pittston Coal Group v. Stebben, 109 S.Ct. 414, 102 L.Ed. 408 (1988) as requiring all Part 727 cases had to be reviewed under Section 410.490.

On November 19, 1987, the Director moved the Board to reconsider its order of remand. (App. 28) The Board issued a new order on June 23, 1988 withdrawing the order to remand and affirming the denial of disability benefits. (App. 30) The Board, cited their decision in Whitman v. Boyle Land and Fuel Co., en banc, 11 BLR 1-99 (1988), holding that Section 410.490 was inapplicable to Part C claims. In

Whitman the Board held that applying Section 410.490 to Part C claims would be a violation of the rule-making procedures of the Administrative Procedures Act, 5 U.S.C. Section 553(b)(c).

On August 26, 1988, Jack Robinette timely filed a Petition to Review before this Honorable Court.

III

FACTS

The petitioner, Jack Robinette, is 60 years old and has an 8th grade education. (App. 103) He began work as a coal miner at age 19 and continued to work as a coal miner for 30 years until February 16, 1979 when he became totally disabled. (App. 37, 49, 57, 111-115) Jack Robinette testified that he had difficulty performing his work even before he left the mines. (App. 59-51) His last

employer, The Youngstown Mines Corporation, wrote a letter to the U.S. Department of Labor stating that at the time Jack Robinette quit coal mining in February 1979 he was too disabled to work. (App. 115)

It is undisputed that Jack Robinette has pneumoconiosis. At hearing, counsel for the Director stipulated that Jack Robinette had pneumoconiosis. (App. 37, 245) At hearing, the Director also conceded that pneumoconiosis played a causal role in Jack Robinette's disability. The Director conceded that the only issue in the case was whether Jack Robinette was totally disabled as defined by the Act. (App. 37, 40, 41)

IV

ISSUES

A. DID THE BENEFITS REVIEW BOARD ERR IN REVERSING THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT SUBSECTION 727.203(b)(3) REBUTTAL WAS NOT ESTABLISHED WHEN THE PARTIES HAD STIPULATED THAT (b)(3) REBUTTAL WAS NOT ESTABLISHED AND THE ISSUE WAS NOT RAISED ON APPEAL?

B. DID THE BENEFITS REVIEW BOARD ERR IN FINDING THAT 20 C.F.R. SECTION 410.490 DID NOT APPLY TO THIS APPLICATION FOR DISABILITY BENEFITS FILED IN 1973?

V

ARGUMENT

A. IF ALL OPPOSING PARTIES STIPULATE TO A FACT OR ISSUE, THE CLAIMANT IS RELIEVED OF THE BURDEN OF PROVING IT

The Benefits Review Board reversed the finding of the Administrative Law Judge that rebuttal pursuant to Subsection

727.203(b)(3) was not established. In so doing, the Board overlooked the fact that counsel for the Director had conceded at the hearing that (b)(3) rebuttal was not established.

Of course, the reason the stipulation was not pointed out to the Board is because (b)(3) rebuttal was not an issue before the Board. The Board's reversal of the Administrative Law Judge's decision on (b)(3) rebuttal was sua sponte.

At hearing, counsel for the Director twice stated on the record that the only issue was the question of total disability. (App. 37 and 41) Director's counsel also stated that he was not raising any issue as to causality. (App. 41) He also stipulated that Jack Robinette had pneumoconiosis and that he

had worked in coal mining for 30 years. (App. 37, 245)

By stipulating to the existence of pneumoconiosis and 30 years of coal mine employment, the Director effectively stipulated to the invocation of the interim presumption pursuant to subsection 727.203(a)(1), which presumes total disability in whole or in part due to pneumoconiosis. The presumption under (a)(1) is invoked if the miner has pneumoconiosis and worked in coal mine employment more than 10 years.

Similarly, the Director also in effect stipulated that the only issue of the claim was rebuttal pursuant to subsection 727.203(b)(2). Rebuttal under (b)(2) is established if the preponderance of the evidence shows that the miner is able to do his former coal mine work. A

miner unable to perform his former coal mine work or comparable work is considered totally disabled under the regulations. 20 C.F.R. Sections 718.204(b) and 725.101(a)(21). When the Director stipulated that the only issue was total disability, he stipulated that he could establish none of the four rebuttals provided at Section 727.203(b) except (b)(2) rebuttal.

One of the rebuttal provisions at Section 727.203(b) is (b)(3) rebuttal. Not only did the Director stipulate that (b)(2) rebuttal was the only issue, he specially stipulated that causality or (b)(3) rebuttal was not an issue.

By stipulating that causality was not to be an issue, the Director in effect stipulated that (b)(3) rebuttal could not be established. The causality issue turns

on whether or not the miner's impairments are related in whole or in part to his coal mine employment. Rebuttal under (b)(3) is established if a preponderance of the evidence shows that the miner's disability did not arise in whole or in part out of his coal mine employment.

The record was held open for 52 days after the hearing for the Director to submit evidence. (App. 39, 77, 99) Jack Robinette was granted the option to respond to the Director's late submission. (App. 39) Had (b)(3) rebuttal been at issue, he would have had the opportunity to seek additional medical evidence on that issue.

At hearing Jack Robinette's counsel was concerned whether (b)(3) rebuttal was an issue and asked for clarification on the record. (App. 40-41) Had she known

that (b)(3) rebuttal was an issue, she would have had the opportunity to submit more evidence on this issue. The opportunity to know what issues are in litigation is basic to the fairness of the judicial process.

Because the Director stipulated that Jack Robinette's impairment was related to his coal mine employment, Mr. Robinette was relieved of any burden of submitting evidence on this issue. The Benefits Review Board has held that if the opposing party stipulates to a fact or issue at the hearing, then the claimant is relieved of any burden of proving it. Cooley v. Alabama By Products Corporation, 5 BLR 819 (1983), footnote 4 at 5 BLR 819; and Backert v. Director, 6 BLR 1-640 (1983).

The Board has also held that if a party concedes an issue at the hearing, it

cannot later raise the issue on appeal to the Board. Mitchellto v. Peabody Coal Company, 4 BLR 1-164 (1981); and Taylor v. 3D Corporation, 3 BLR 1-350 (1981). The Director did not raise the issue on appeal, but it would seem that the Board should not sua sponte raise issues on appeal that the parties are prohibited from raising.

This case should be reversed and remanded for the payment of benefits. The interim presumption that Jack Robinette is totally disabled in whole or in part due to pneumoconiosis has not been rebutted. The Board's finding that (b)(2) rebuttal was not established has not been challenged. The Board erred in reversing the Administrative Law Judge's finding as to (b)(3) rebuttal. The Administrative

Law Judge's finding that (b)(3) rebuttal was not established should be affirmed.

A remand for the development of further evidence would be unfair. Jack Robinette applied for benefits 16 years ago. The slowness of the judicial process might be unavoidable, but it is an injustice. The federal black lung program is infamous for awarding benefits to miners after they have died. This case should be remanded for payment of benefits.

B. THE BENEFITS REVIEW BOARD ERRED IN FINDING THAT 20 C.F.R. SECTION 410.490 IS INAPPLICABLE TO THIS CASE

(SUBPART B IS OMITTED BECAUSE IT IS IRRELEVANT FOR PURPOSES OF THIS APPENDIX.)

VI

CONCLUSION

Jack Robinette's entitlement to disability income benefits under the Act is established under 2 independent sections of the regulations. He has established his claim under both Section 727.203 and Section 410.490. Establishment of his claim under either one of these sections would entitle him to disability benefits. Jack Robinette has established his claim under both. This case should be remanded for payment of benefits to the disabled coal miner.

Respectfully submitted,

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APPENDIX C

APPENDIX C IS THE REPLY BRIEF WHICH JACK ROBINETTE FILED IN THE FOURTH CIRCUIT AS THE PETITIONER. THE BRIEF IS REPRODUCED IN ITS ENTIRETY EXCEPT FOR PARTS D AND E, WHICH HAVE BEEN OMITTED BECAUSE THEY ARE IRRELEVANT TO THE PURPOSE OF THIS APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 88-1144

JACK ROBINETTE,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITIONER'S REPLY BRIEF

ON APPEAL FROM THE BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR

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REPLY ARGUMENT

The petitioner's contentions on appeal are set forth in his opening brief. The petitioner here seeks to reply to the points raised by the Director in his brief.

A. THE DIRECTOR'S STIPULATION THAT PNEUMOCONIOSIS WAS A CAUSAL FACTOR IN JACK ROBINETTE'S DISABILITY WAS NOT PREJUDICED AFTER THE HEARING BY THE FOURTH CIRCUIT'S DECISION IN SYKES V. DIRECTOR

The petitioner, Jack Robinette, contends that the Benefits Review Board improperly denied his application for benefits by finding that pneumoconiosis was not a causal factor in his total disability. Based on this finding, the Board found that the Director had established rebuttal pursuant to Section 727.203(b)(3), hereinafter referred to as

(b)(3) rebuttal. Jack Robinette contends that he did not have to prove that pneumoconiosis is a causal factor in his disability because the Director stipulated that fact. If one party stipulates a fact, the opposing party is relieved of the burden of proving it.

On the list of contested issues which the Deputy Commissioner filed, the Director did not contest issue number nine, that "[t]he miner's disability or death is (was) due to pneumoconiosis." (App. 246) It is on this document that the Director states which of the issues necessary to entitlement he is going to contest. The preparation of medical evidence in a federal black lung case is time consuming and expensive. The Benefits Review Board has held that the claimant is entitled to rely on the list

of contested issues and is relieved of the burden of proving any fact which the Director does not contest on the list of contested issues. See Thornton v. Director, 8 BLR 1-277 (1988), in which the claimant was relieved of the burden of proving pneumoconiosis.

The Benefits Review Board held in Thornton that the Director could not amend the list of contested issues immediately prior to the hearing. In Jack Robinette's case, the Director never sought to amend the list of contested issues. At hearing, the Director stated that causality was not an issue and that the only issue was total disability. (App. 37 and 41)

Jack Robinette submitted no evidence. (App. 37) He relied on the evidence developed by the Deputy Commissioner and the Director. He was entitled to rely on

the Director's stipulation that causality was not an issue. Had Jack Robinette known causality was an issue, he would have had an opportunity both before and after hearing to develop evidence on the issue. (App. 37-39) Since causality was not an issue, he did not do so.

When Jack Robinette appealed the Administrative Law Judge's finding of (b)(2) rebuttal, the Benefits Review Board failed to note that the Director had conceded that Robinette's disability was due to pneumoconiosis and sua sponte found that Robinette's pneumoconiosis played no role in his disability and that (b)(3) rebuttal was, therefore, established.

In his response brief, the Director argues that he should not be held to his stipulation because he has been prejudiced by a change of law in the Fourth Circuit

which occurred after hearing. The case the Director refers to is Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR (4th Circuit 1987).

The Court in Sykes v. Director, OWCP, held that evidence showing a miner has no respiratory impairment does not establish rebuttal pursuant to Section 727.203(b)(2). The Court held that (b)(2) rebuttal could be established only by a showing that the miner was not totally disabled based on all his disabilities.

The Court also held that a finding that the miner had no respiratory impairment would establish (b)(3) rebuttal but not (b)(2) rebuttal. To establish (b)(3) rebuttal, the Director must establish that pneumoconiosis is not a causal factor in the miner's total disability. See Bethlehem Mines

Corporation v. Massey, 736 F.2d 120 (4th Circuit 1984). If the miner has no respiratory impairment, then pneumoconiosis is not a causal factor in his disability.

The Director contends, after Sykes v. Director, OWCP, that evidence showing the miner is not totally disabled from a respiratory standpoint is sufficient to establish (b)(3) rebuttal. This contention is wrong. Even though a miner is not totally disabled from a respiratory standpoint, (b)(3) rebuttal is not established by that evidence. If a respiratory impairment caused by pneumoconiosis is partially responsible for the miner's total disability, he is entitled to black lung benefits. For the Director to establish (b)(3) rebuttal, he must rule out that a miner's total

disability arises in whole or in part from pneumoconiosis. See Bethlehem Mines v. Massey, supra. Sykes v. Director, OWCP did not change the standard for (b)(3) rebuttal, which is the standard present in this action.

If the Director establishes that the miner has no respiratory impairment, this would rule out pneumoconiosis as a causal factor in the miner's disability and establish (b)(3) rebuttal. Establishing that the miner is not totally disabled due to a respiratory impairment does not rule out that pneumoconiosis plays a partial cause of the miner's disability and does not establish (b)(3) rebuttal.

When the Director conceded that the miner's disability was caused by pneumoconiosis, he conceded that (b)(3) rebuttal was not established. Nothing in

Sykes v. Director, OWCP prejudices the Director's concession. The stipulation is unaffected by the change of law the Director now seeks to rely on as unfairly prejudicing the Director's stipulation.

Before Sykes v. Director, OWCP, the Director argues he could establish total disability or (b)(2) rebuttal, by showing that the miner was not totally disabled due to a respiratory impairment. This was the Benefits Review Board's holding in Sykes v Itman Coal Company, 2 BRB 1-1089 (1980) which is cited by the Director. This is true, and when Sykes v. Director, OWCP was decided by the Fourth Circuit, it established a standard which followed the plain meaning of the regulations. It was, however, a tougher standard for the Director to meet to establish (b)(2) rebuttal.

Sykes v. Director, OWCP made it tougher for the Director to establish total disability and (b)(2) rebuttal, but it did not prejudice the Director's stipulation. The Director's stipulation was that causation and (b)(3) rebuttal were conceded. The Director was still free to establish (b)(2) rebuttal, but he failed to do so.

It is impossible to see how the Director's stipulation that pneumoconiosis was a causal factor in Jack Robinette's impairment was prejudiced by the change of law announced in the Sykes v. Director, OWCP case. Prior to the Sykes v. Director, OWCP decision, the Director could rebut the presumption pursuant to (b)(2) rebuttal by showing that the miner was not totally disabled. After Sykes v. Director, OWCP, the Director could still

rebut the presumption by (b)(2) rebuttal with a showing that the miner was not totally disabled. The Director stipulated the only issue was total disability. Had he proved that the miner was not totally disabled, the Director would have established (b)(2) rebuttal.

The Benefits Review Board found the evidence insufficient to prove that the miner was not totally disabled. The Board held, therefore, that (b)(2) rebuttal was not established. Importantly, the Director has not challenged that finding.

The Director's stipulation that causation was not an issue was not prejudiced by the Fourth Circuit's decision in Sykes v. Director, OWCP. The Director should be held to his stipulation given many times on the record.

B. IT WAS IMPROPER AND PREJUDICIAL TO JACK ROBINETTE FOR THE BENEFITS REVIEW BOARD TO MAKE A FINDING CONTRARY TO WHAT THE PARTIES HAD STIPULATED WAS TRUE.

The Director argues that the Benefits Review Board should sua sponte raise new issues on appeal if it is necessary to reach a proper result. This is true as a general principle, and it is particularly true when there has been a material intervening change of law.

For the intervening change to be material, however, it must have some prejudicial effect on one of the parties. It has already been pointed out that the intervening change of law cited by the Director did not prejudice the position the Director took at the hearing.

Although it may be proper for the Benefits Review Board, in certain circumstances, to sua sponte raise new

issues, it is not proper for the Board to change facts stipulated by adversarial parties.

The Director conceded that pneumoconiosis was a significant causal factor in Jack Robinette's total impairment. Jack Robinette was entitled to rely on that stipulation. After Jack Robinette failed to introduce any evidence as to causation, despite having full opportunity to do so, it is patently unfair for the Benefits Review Board to sua sponte reverse the Director's stipulation.

At hearing, the Director stated on the record, "The only issue at hand is the question of total disability." (App. 37) Causation was not noted as an issue which the Director would contest on the prehearing controversion sheet which is

designed to narrow issues for hearing. (App. 246) Counsel for Jack Robinette stated that she was "surprised" that "causation" was not an issue. Counsel for the Director replied, "I could raise it (causation) but I don't think I'm going to." (App. 41) In response to the Administrative Law Judge's statement, "Well, then we are all agreed we are proceeding solely on the issue of total disability", whereupon counsel for the Director replied, "Yes, Your Honor." (App. 41)

The Director stated four times on the record that causation was not an issue, and Jack Robinette was entitled to rely on that stipulation.

Importantly, the Director cites no case, where any appellant body has sua sponte overturned a stipulation of fact

agreed to by the parties in an adversarial proceeding.

C. THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT (b)(3) REBUTTAL WAS NOT ESTABLISHED IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The Director argues in his brief that "Robinette has not challenged the factual sufficiency of the evidence to establish (b)(3) rebuttal." Of course, Jack Robinette relies on the sufficiency of the Director's initial stipulation to satisfy that factual point.

Assuming arguendo, that the Director had not so stipulated, the evidence in the record supports the Administrative Law Judge's finding that (b)(3) rebuttal was not established.

The Administrative Law Judge invoked the interim presumption because all x-rays were positive for pneumoconiosis. By

operation of law, it is, therefore, presumed that Jack Robinette's disability is due to pneumoconiosis. This is a rebuttable presumption, and the Director has the burden to disprove it.

To establish rebuttal pursuant to Subsection 727.203(b)(3), the Director must rule out pneumoconiosis as a causal factor in the miner's impairment. Even if pneumoconiosis would not in and of itself prevent the miner from returning to his former coal mine work, (b)(3) rebuttal is still not established if the miner's impairment is partially caused by pneumoconiosis. Bethlehem Mines Corporation v. Massey, supra.

Here, the Administrative Law Judge found only Dr. Patham Thavaradhara had discussed whether or not pneumoconiosis could be ruled out as a causal factor of

Jack Robinette's impairment. The Administrative Law Judge gave Dr. Thavaradhara's report little weight for two reasons.

First, the report was inconsistent as to whether or not Jack Robinette had pneumoconiosis. Dr. Thavaradhara referred Jack Robinette to a board certified radiologist, Dr. Al-Asbahi, who read the chest x-ray as positive for pneumoconiosis 1/1. (App. 77, 78) Without explanation, Dr. Thavaradhara states that his evaluation shows no evidence of pneumoconiosis by chest x-ray. (App. 91) Second, the Administrative Law Judge found that Dr. Thavaradhara was tentative in stating that he through heart disease caused Jack Robinette's impairment. Dr. Thavaradhara stated, "I believe he is disabled <u>mainly</u> due to his heart

condition. I would advice (sic) to get opinion from his heart physician." Emphasis added (App. 100) This statement does not rule out pneumoconiosis as playing some role. Also, it is an expression of uncertainty on the part of the Doctor, who advises that other experts be consulted. (App. 100) This is not good rebuttal evidence.

Substantial evidence supports the Administrative Law Judge's conclusion that only Dr. Thavaradhara's report goes to the issue of whether or not Jack Robinette's pneumoconiosis can be ruled out as a causal factor in his impairment. The Judge's reasons for discounting Dr. Thavaradhara's inconsistent opinion are rational.

Dr. Nesterman stated that Jack Robinette had pneumoconiosis but that his

impairment was not severe enough to prevent him from returning to his coal mine work. (App. 252A) The Administrative Law Judge was correct in finding that Dr. Nesterman's report did not go to the issue of (b)(3) rebuttal. The issue in (b)(3) rebuttal is not whether the miner's pneumoconiosis alone will prevent him from returning to his coal mine work, but rather whether pneumoconiosis can be ruled out as a causal factor in the miner's impairment. Bethlehem Mines Corporation v. Massey, Ibid.

Dr. Tans' report did not discuss whether Jack Robinette had pneumoconiosis or whether it was a causal factor in his impairment. (App. 149-156, 210-213) The medical records of Jack Robinette's heart surgery and treatment for heart disease do

not discuss Jack Robinette's pneumoconiosis or whether he has impairments other than heart disease.

The Director failed to establish (b)(3) rebuttal with evidence sufficient to overcome the presumption that pneumoconiosis was a causal factor in Jack Robinette's disability. Accordingly, the Administrative Law Judge's finding that (b)(3) rebuttal was established should be affirmed, as supported by substantial evidence, even if it is assumed that the Director had not stipulated that Jack Robinette's disability was due to pneumoconiosis.

The sua sponte finding of the Benefits Review Board that pneumoconiosis was not a causal factor in Jack Robinette's total disability should be reversed. It was improperly assumed by

the Board that causation was at issue when it had been stipulated out of the contested issues to be decided. In any event, the Administrative Law Judge's finding that the evidence did not rebut the causation presumption is rational and supported by substantial evidence and should be upheld.

This case should not be remanded so that the Director can withdraw his stipulation and the case be relitigated for two reasons.

First and most importantly, Jack Robinette applied for disability income benefits under the Act in 1973. He has waited sixteen years for a final decision on this case. The federal black lung program is notorious for its long delays, with a final award of benefits on the miner's claim occurring, more than

occasionally, after the miner has died.

Second, the Administrative Law Judge's decision that the evidence did not support (b)(3) rebuttal is supported by substantial evidence. The Judge's decision was based both on the evidence and the Director's stipulation that the only issue was total disability.

This case should be remanded to the Department of Labor for the payment of benefits.

PARTS D AND E HAVE BEEN OMITTED
BECAUSE THEY ARE IRRELEVANT TO
THE PURPOSE OF THIS APPENDIX

CONCLUSION

Jack Robinette's entitlement to benefits is established on two grounds. He invoked the presumption that he is totally disabled due to pneumoconiosis under both Section 727.203 of the Department of Labor's regulation and

Section 410.490- of Social Security's regulations. In neither case has the Director, OWCP met his burden of established rebuttal.

This case should be remanded for the payment of benefits to the Deputy Commissioner of the Division of Coal Mine Workers' Compensation, United States Department of Labor.

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